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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Federal-State Joint Board on	)	CC Docket No. 96-45
Universal Service	)	

JOINT COMMENTS OF THE INFORMATION TECHNOLOGY ASSOCIATION OF AMERICA AND THE ELECTRONIC MESSAGING ASSOCIATION

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EXECUTIVE SUMMARY

The Commission should adopt its proposal to expand universal service to include voice grade access, touch tone service, single-party service, access to 911 service, and access to operator services. This core group of services will ensure that all Americans are able to participate fully in the Information Age. The Commission, however, should not expand the definition of universal service to include the other basic and enhanced services identified by the Notice. The costs of expanding universal service to include services to which even many businesses do not subscribe would cripple the telecommunications industry and would unfairly burden users of interstate telecommunications. More important, expanding universal service to include unregulated enhanced services would be totally inconsistent with the definition of universal service adopted by Congress.

Consistent with the requirement of the 1996 Act that all universal service subsidies be made "explicit," the Commission should revisit and reform its jurisdictional separations rules, eliminate the carrier common line charge, and remove all other subsidies -- hidden or otherwise -- from interstate access charges. Such action, however, should not result in "any increase in the overall nationwide level of universal service support that occurs today." Once all universal service subsidies are made explicit, the Commission should evaluate whether these subsidies are achieving the purposes of Section 254 (or merely rewarding inefficient providers of local exchange service), and ensure that these subsidies are properly targeted.

A revenue-based methodology would appear to be the fairest and least complicated means of allocating universal service support obligations among telecommunications carriers. Such an approach, however, should be limited to telecommunications-based revenues. Equally important, telecommunications carriers should not be permitted to "bury" their universal service contributions in their rates; rather, they should be required to include a separate universal service charge on their invoices to customers.

The universal service support obligations contemplated by Section 254 should be limited to telecommunications carriers. The Commission certainly should not extend these obligations to purely private networks that are operated by companies solely for their own internal business purposes. Plainly, such networks are not "provider[s] of telecommunications" within the meaning of Section 254(d). Further, there is no reason to subject these purely private networks to the obligations of Section 254, because the operators of these networks, like other users, will contribute to universal service through the payments they make to the telecommunications carriers from which they obtain service.

The Commission should also not subject "other provider[s] of telecommunications" to the universal service support obligations of Section 254. These private operators serve a limited clientele, are relatively small in size, and generally do not benefit from universal service in the same way telecommunications carriers do. If the Commission is inclined to subject other providers of telecommunications to the universal support obligations of Section 254, it should limit this requirement to those providers that own their own transmission facilities. Private operators that merely resell the services of facilities-based carriers will have already paid their pro rata share for the preservation and advancement of universal service. Plainly, it would be unfair to require these providers to contribute twice: once in the payments they make to carriers for their underlying service and once directly to the universal service fund administrator.

The Commission should designate a single, non-governmental administrator to collect and distribute universal service support payments. Such an approach would be far preferable to relying on fifty different state commissions or groups of commissions.

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The Information Technology Association of America ("ITAA") and the Electronic Messaging Association ("EMA") hereby submit the following comments in response to the Notice of Proposed Rulemaking and Order Establishing Joint Board ("Notice") which the Commission issued in the above-captioned proceeding on March 8, 1996.[1] In the Notice, the Commission has inquired how best to implement Congress' directives regarding universal service, as set forth in new Section 254 of the Communications Act.[2]

I. INTRODUCTION

A. Identification and Interest of ITAA and EMA

ITAA is the principal trade association of the Nation's information technology industries. Together with its twenty-five affiliated regional technology councils, ITAA

[1] Federal-State Joint Board on Universal Service, Notice of Proposed Rulemaking and Order Establishing Joint Board, FCC 96-93, CC Docket No. 96-45 (released Mar. 8, 1996) [hereinafter "Notice"].

[2] New Section 254 was added to the Communications Act by Section 101 of the Telecommunications Act of 1996. See Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) [hereinafter "1996 Act"].

represents more than 9,000 companies throughout the United States. ITAA's members provide the public with a wide variety of information products, software and services. Chief among these, at least from the Commission's perspective, are network-based enhanced services. The enhanced services furnished by ITAA's member companies are used by business, government, and residential consumers, and include such diverse offerings as credit card authorization, computer-aided design and manufacturing, database retrieval, electronic data interchange, gateways, information management, payroll processing, transaction processing, voice mail, and other remote access data processing services.

EMA is an inter-industry forum dedicated to the promotion, development and use of electronic messaging technologies for secure global electronic commerce. Founded in 1983, EMA is now composed of over 500 user and provider member companies representing major Fortune 500 corporations. EMA's members come from such diverse industries as aerospace, automotive, financial services, pharmaceuticals, consumer products, retail, telecommunications, natural resources, consulting, hardware and software development, and network services. This gathering of a diverse user and provider membership creates the most comprehensive resource for information on the messaging industry and the issues affecting its future.

Mindful of the Commission's recent admonition that parties with like interests should join together in common filings, ITAA and EMA have decided to submit these joint comments in this most important proceeding.

B. Summary of Position

ITAA and EMA wholly support the goals and principles of universal service. As Congress has directed and as the Commission has recognized, the longstanding goal of making "plain old telephone service" available to all Americans needs to be updated. ITAA and EMA endorse the Commission's tentative conclusion that traditional universal service should be expanded to include voice grade access, touch tone service, single-party service, as well as access to 911 and operator services. Absent some compelling showing, however, the list of "core" services qualifying for universal service support should not be extended at this point in time. Under no circumstances should the definition of universal service be expanded to include unregulated enhanced services.

In addition, ITAA and EMA urge the Commission to: (1) implement fully the requirement of the 1996 Act that universal service subsidies be made "explicit" by eliminating all such subsidies from interstate access charges; (2) devise a new universal support mechanism that collects subsidies on an equitable and nondiscriminatory basis from all telecommunications common carriers; (3) either not require universal service contributions from "other provider[s] of telecommunications" or limit such contribution to facilities-based providers; (4) make clear that purely private networks are not required to make universal service contributions; and (5) appoint a single, non-governmental entity to administer the collection and distribution of universal service support payments.

II. THE DEFINITION OF UNIVERSAL SERVICE SHOULD BE LIMITED TO THE CORE SERVICES IDENTIFIED BY THE NOTICE

In passing the 1996 Act, Congress affirmed the importance of universal service as a national public policy goal.[3] In issuing its Notice, the Commission has, for the most part, faithfully responded to the will of Congress by proposing an expanded, but carefully crafted, definition of universal service. Specifically, the Commission has proposed to expand universal service to include: (1) voice grade access; (2) touch tone service; (3) single-party service; (4) 911 access; and (5) operator service access.[4] ITAA and EMA wholeheartedly endorse the Commission's proposal. The core group of services identified by the Notice will ensure that all Americans are in a position to participate fully in the "Information Age."

The Commission, however, has also solicited comment on whether universal service should include a host of other basic and enhanced services, such as Internet access,[5] data transmission,[6] Signalling System 7,[7] broadband services[8] (including DS3 links,[9] ISDN[10] and

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[3] See 47 U.S.C. § 254. For clarity, the provisions of the 1996 Act referenced herein are identified by the sections at which they will be codified.

[4] Notice at ¶ 16.

[5] Id. at ¶¶ 23, 79-80 & nn.172, 174.

[6] Id. at ¶¶ 23, 91.

[7] Id. at ¶ 23.

[8] Id.

[9] Id. at ¶ 80 n.174.

[10] Id. at ¶ 92 & n.201.

ATM[11]), voice mailboxes,[12] electronic mail,[13] storage and retrieval of data and images,[14] news groups,[15] resource location services,[16] and information services that can be carried over the Internet.[17] ITAA and EMA submit that such an expansive definition of universal service is wholly unwarranted and flatly inconsistent with the plain language of the Act. ITAA and EMA can conceive of no justification for including within the definition of universal service an array of basic services to which even many businesses do not subscribe. The costs of doing so would cripple the telecommunications industry and would unfairly burden users of interstate telecommunications services. More important from ITAA's and EMA's perspective, expanding the definition of universal service to include unregulated enhanced services would be totally inconsistent with the definition of universal service adopted by Congress.

New Section 254(c)(1) of the Communications Act defines universal service as "an evolving level of telecommunications services that the Commission shall establish periodically under this section, taking into account advances in telecommunications and information technologies and services."[18] The Act further directs:

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[11] Id.

[12] Id. at ¶ 57 n.128.

[13] Id. at ¶ 79 n.172.

[14] Id. at ¶ 91.

[15] Id.

[16] Id.

[17] Id. at ¶ 108.

[18] 47 U.S.C. § 254(c)(1) (emphasis added).

> The Joint Board in recommending, and the Commission in establishing, the definition of the services that are supported by Federal universal service support mechanisms shall consider the extent to which such telecommunications services --
>
> (A) are essential to education, public health, or public safety;
>
> (B) have, through the operation of market choices by customers, been subscribed to by a substantial majority of residential customers;
>
> (C) are being deployed in public telecommunications networks by telecommunications carriers; and
>
> (D) are consistent with the public interest, convenience, and necessity.[19]

In short, the 1996 Act limits universal service to a subset of telecommunications services selected by the Commission and Federal-State Joint Board.[20]

This conclusion is confirmed by other provisions of the 1996 Act which give meaning to the terms "telecommunications" and "telecommunications service." Section 153(48) of the 1996 Act defines "telecommunications" as:

> the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.[21]

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[19] Id. (emphasis added).

[20] Indeed, the Senate has unambiguously stated that "information or cable services are not included in the definition of universal service." S. Rep. No. 104-23, 104th Cong., 1st Sess. 27 (1995) (emphasis added).

[21] 47 U.S.C. § 153(48) (emphasis added). This definition is akin to the definition of basic service adopted by the Commission and affirmed by the courts. Computer & Communications Indus. Ass'n v. FCC, 693 F.2d 198, 205 n.18 (D.C. Cir. 1982), cert. denied, 461 U.S. 938 (1983) ("Basic [telecommunications] service is the offering of 'a pure transmission capability over a communications path that is virtually transparent in terms of its interaction with customer supplied information.'"); see, e.g., FCC v. Midwest Video Corp., 440 U.S. 689, 701 (1979) (A common carrier communications service is one in which subscribers "'communicate or transmit intelligence of their own
(continued...)

In adopting this language, the Congress accepted the Senate's definition of "telecommunications."[22] The report accompanying the Senate bill unambiguously explains that the Senate's definition of "telecommunications":

> excludes those services, such as interactive games or shopping services and other services involving interaction with stored information, that are defined as information services.[23]

The same is true of the 1996 Act's definition of "telecommunications service." Section 153(51) defines such services as:

> the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.[24]

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[21](...continued) design and choosing.'") (quoting Industrial Relocation Service, 5 F.C.C.2d 197, 202 (1966)); National Ass'n of Reg. Util. Comm'rs v. FCC, 533 F.2d 601, 609-10 (D.C. Cir. 1976) ("A second prerequisite to common carrier status . . . is the requirement that the system be such that customers 'transmit intelligence of their own design and choosing.'").

[22] See H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 116 (1996) ("The House recedes to the Senate with amendments with respect to the definition[] of . . . 'telecommunications.'").

[23] S. Rep. No. 23, 104th Cong., 1st Sess. 17-18 (1995) (emphasis added).

[24] 47 U.S.C. § 153(51). This definition incorporates the common law definition of common carrier communications:

> An examination of the common law reveals that the primary sine qua non of common carrier status is a quasi-public character, which arises out of the undertaking "to carry for all people indifferently . . . ." This does not mean that the particular services offered must practically be available to the entire public; a specialized carrier whose service is of possible use to only a fraction of the population may nonetheless be a common carrier if he holds himself out to serve indifferently all potential users.

National Ass'n of Reg. Util. Comm'rs v. FCC, 533 F.2d 601, 608 (D.C. Cir. 1976).

As is the case with respect to the definition of "telecommunications," the 1996 Act's definition of "telecommunications service" reflects the Senate bill.[25] Like the definition of "telecommunications," the Senate bill's definition of "telecommunications service":

> <u>does not include information services</u>, cable services, or "wireless" cable services, but does include the transmission, without change in the form or content, of such services.[26]

That information services (or, in the Commission's parlance, enhanced services) are not included within the definition of telecommunications service is confirmed by the fact that the 1996 Act also contains a separate definition of "information service":

> the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.[27]

In the past, the Commission has repeatedly concluded that "information service," as used in the Modification of Final Judgment and as incorporated in the 1996 Act, is equivalent to "enhanced service,"[28] as defined by Section 64.702(a) of the Commission's rules.[29] Just as enhanced

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[25] H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 116 (1996) ("The House recedes to the Senate with amendments with respect to the definition[] of . . . 'telecommunications service.'").

[26] S. Rep. No. 23, 104th Cong., 1st Sess. 18 (1995) (emphasis added).

[27] 47 U.S.C. § 153(41). This definition is based on the House bill's definition of "information service," which is based "on the definition used in the Modification of Final Judgment." H.R. Rep. No. 204, 104th Cong., 1st Sess. 125 (1995). <u>See</u> H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 116 (1996).

[28] <u>See</u>, <u>e.g.</u>, <u>Amendment of Part 69 of the Commission's Rules Relating to Enhanced Service Providers</u>, 3 FCC Rcd 2631, 2633 (1988) ("The MFJ contains a restriction on BOC provision of 'information services,' a category that appears to be substantially
(continued...)

services are not treated as regulated common carrier communications services by the Commission,[30] the 1996 Act limits regulation to telecommunications services. Consistent with this differing treatment of telecommunications and information services, the 1996 Act expressly provides that only "telecommunications carriers" are eligible for universal service support payments;[31] information service providers are not. This, in turn, is consistent with the remainder of the 1996 Act, which uniformly treats telecommunications services and information services as two distinct categories of service.[32]

The plain language of the 1996 Act, together with the legislative history of the House and Senate bills, thus make clear that "information services" are not "telecommunications services." As a consequence, the Commission may not, consistent with the 1996 Act, expand

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[28](...continued)
equivalent to the Commission's regulatory category of 'enhanced services.'"); Filing and Review of Open Network Architecture Plans, 4 FCC Rcd 1, 24 n.60 (1988) ("The Modified Final Judgment . . . prohibited the BOCs from offering any 'information services,' a class of services that apparently is similar to enhanced services.").

[29]

> [E]nhanced services shall refer to services, . . . which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber with additional, different, or restructured information; or involve subscriber interaction with stored information.

47 C.F.R. § 64.702(a) (1995).

[30] See id.

[31] 47 U.S.C. § 254(e).

[32] Compare, e.g., 47 U.S.C. § 272(a)(2)(B) (interLATA telecommunications services) with id. § 272(a)(2)(C) (interLATA information services).

the definition of universal service to include information services. Were the Commission to do so, it would improperly exceed its statutory authority.[33]

ITAA and EMA are not unaware that certain provisions of the 1996 Act state, as a matter of principle, that consumers should have "access to advanced telecommunications and information services."[34] The operative language in these statements of principle, however, is access. Significantly, none of the operative provisions of the 1996 Act directs that information services be included within the definition of universal service. This is not surprising. Universal access to information services can be achieved through the use of telecommunications services such as voice grade lines and touch tone service, two elements of the definition of universal service proposed by the Notice.

The Commission should therefore limit the definition of universal service to the five core services proposed by the Notice.

III. ALL UNIVERSAL SERVICE SUBSIDIES SHOULD BE MADE EXPLICIT AND REMOVED FROM INTERSTATE ACCESS CHARGES

One of the most significant of the universal service provisions of the 1996 Act is the requirement that all universal service subsidies be made "explicit."[35] As the Conference Committee's report explains, "the conferees intend that any support mechanisms continued or

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[33] See Notice at ¶ 57 n.128.

[34] See, e.g., 47 U.S.C. §§ 254(b)(2),(3),(6) & (h)(2).

[35] 47 U.S.C. § 254(e).

created under new Section 254 should be explicit, rather than implicit as many support mechanisms are today."[36]

In apparent response to this directive, the Commission's Notice seeks comment on whether it would be consistent with the 1996 Act to continue utilizing universal service support mechanisms (e.g., Universal Service Fund ("USF"), dial equipment minute ("DEM") weighting, and Link-Up America) that are based on the jurisdictional separations rules.[37] The Commission also asks whether subscriber local loop costs and Long-Term Support ("LTS") payments should continue to be recovered through the per-minute carrier common line ("CCL") charge paid by interexchange carriers.[38] ITAA and EMA submit that continued reliance on the Commission's jurisdictional separations rules and the collection of universal service subsidies through interstate access changes would violate the express mandate of the 1996 Act that all universal service subsidies be made explicit.

As the Commission is well aware, the jurisdictional separations process allows local exchange carriers ("LECs") to shift a disproportionate share of their costs to the interstate jurisdiction. These misallocated costs -- which drive the calculation of, and are recovered through, interstate access charges -- permit the LECs to maintain artificially low rates for local service. Because these subsidies are hidden -- i.e., they parade as an accurate allocation of costs between the interstate and intrastate jurisdictions -- they violate the express provisions of new Section 254(e) of the Communications Act. The Commission should therefore revisit and

[36] H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 131 (1996).

[37] Notice at ¶ 30.

[38] Id. at ¶¶ 114-15.

reform its jurisdictional separations rules and, once having done so, eliminate all hidden universal service subsidies from interstate access charges.

The Commission should similarly eliminate the CCL charge paid by interexchange carriers. The CCL charge is without a doubt a subsidy. At present, it subsidizes the costs of subscriber local loops, LTS payments, and payphone service.[39] The 1996 Act therefore requires that the hidden subsidies generated by the CCL charge be eliminated and made part of the universal service support mechanism established by this proceeding. As the Commission correctly notes:

> [t]he current CCL charge appears to be inconsistent with the directives of the 1996 Act that universal service support flows 'be explicit' and be recovered on a 'nondiscriminatory basis' from all telecommunications carriers providing interstate telecommunications service.[40]

Alternatively, all of the costs associated with a local loop dedicated to a single subscriber should be recovered from that subscriber through a flat, non-traffic sensitive charge. As the Notice points out, both the Commission and the Federal-State Joint Board have previously concluded that the recovery of subscriber loop costs from subscribers through flat-rate charges would increase demand for long distance service and produce substantial efficiency gains with minimal impact on telephone subscribership.[41] In fact, as recently as February of this year, the Commission stated that "[t]he removal of the common line recovery element from the per-minute

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[39] The 1996 Act expressly requires the Commission to eliminate all payphone subsidies from the CCL charge within nine months of the legislation's enactment. See 47 U.S.C. § 276(b)(1)(B).

[40] Notice at ¶ 113.

[41] Id. (citing MTS and WATS Market Structure: Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, 2 FCC Rcd 2953, 2955 (1987)).

CCL charge would create significant public interest benefits."[42] The Commission also explained that the removal of local loop costs from the CCL charge would increase economic efficiency:

> We have long recognized that the per-minute recovery of local loop costs leads to price distortions. The recovery of non-traffic sensitive local loop costs through a usage charge on interexchange carriers tends to shift costs recovery onto high-volume long-distance users, thereby artificially suppressing demand for long-distance services. In addition, IXCs currently pay more, in usage-sensitive CCL charges, to serve customers with higher usage levels than they pay to serve other customers, even though Ameritech's costs to provide loops to those high-volume users are not higher than for low-volume users.[43]

For similar reasons, the Commission should also adopt its tentative conclusion to eliminate the recovery of LTS payments through the CCL charge.[44]

In addition to being inconsistent with the plain language of the 1996 Act, collecting universal service subsidies through certain types of interstate access charges is discriminatory. As the 1996 Act makes clear, universal service support is the obligation of every telecommunications carrier that provides interstate service. That obligation should not vary or depend on the types of interstate access charges that a telecommunications carrier pays.

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[42] Ameritech Operating Companies Petition for a Declaratory Ruling and Related Waivers to Establish a New Regulatory Model for the Ameritech Region, 1996 FCC LEXIS 775 at ¶ 110, FCC 96-58 (released Feb. 15, 1996).

[43] Id. at ¶ 109. See also The NYNEX Telephone Companies Petition for Waiver -- Transition Plan to Preserve Universal Service in a Competitive Environment, 10 FCC Rcd 7445, 7476 (1995) ("Matching interstate access rate structures and levels more closely with economic costs . . . should both stimulate the potential growth in the purchase of access services and reduce LEC costs in providing such services. These developments should, in turn, increase overall consumer welfare and lead to lower overall access costs. Artificially high rates suppress demand, encourage customers to shift traffic to alternative carriers that may not be the most efficient providers, and produce incorrect market entry signals.").

[44] Notice at ¶ 115.

The collection of universal subsidies through interstate access charges is also inconsistent with the public interest because it encourages the inefficient pricing of LEC networks, and discriminates against high-volume users of interexchange service who must pay artificially inflated rates for long distance service. Given that economic efficiency would increase, market distortions and discriminatory treatment would be eliminated, and telephone subscribership would not be materially affected, eliminating the recovery of universal service subsidies from interstate access charges would serve both the public interest and the express requirements of the 1996 Act. The Commission should act accordingly.

The removal of all subsidies -- hidden or otherwise -- from interstate access charges should not result in "any increase in the overall nationwide level of universal service support that occurs today."[45] Indeed, once all universal service subsidies are plainly identified, the Commission will be in a better position to evaluate whether these subsidies are achieving their intended goal or merely rewarding inefficient providers of local exchange service. The Commission will also be able to target universal service subsidies more precisely and, as a consequence, reduce the size of the subsidies needed to achieve the universal service goals of new Section 254 of the Act.

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[45] S. Rep. No. 23, 104th Cong., 1st Sess. 25-26 (1995).

IV. THE COMMISSION SHOULD ENSURE THAT ALL TELECOMMUNICATIONS CARRIERS THAT PROVIDE INTERSTATE SERVICE CONTRIBUTE TO THE SUPPORT OF UNIVERSAL SERVICE ON AN EQUITABLE AND NONDISCRIMINATORY BASIS

New Section 254(d) of the Act requires every telecommunications carrier that provides interstate service to contribute to universal service on an equitable and nondiscriminatory basis.[46] In the Notice, the Commission seeks comment on the best methodology for calculating a carrier's contribution obligation to universal service support.[47] More specifically, the Commission solicits comments on three alternative approaches for computing a carrier's contribution: (1) gross revenues; (2) gross revenues net of payments to other carriers; and (3) per-line or per-minute based payments.[48]

ITAA and EMA submit that the specific methodology used to calculate a carrier's contribution is far less important than the overriding principle that all telecommunications carriers contribute on a nondiscriminatory basis. Thus, any of the methodologies identified by the Commission would be preferable to the current situation in which interstate telecommunications carriers pay inflated access charges to support universal service.

On balance, a revenue-based methodology would appear to be the fairest means of allocating universal service support among telecommunications carriers. The Commission's reasoning in the Regulatory Fees Order is instructive in this regard.[49] A per-line approach

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[46] 47 U.S.C. § 254(d).

[47] Notice at ¶¶ 121-26.

[48] Id. at ¶¶ 122-24.

[49] Assessment and Collection of Regulatory Fees for Fiscal Year 1995, Price Cap Treatment of Regulatory Fees Imposed by Section 9 of the Act, 10 FCC Rcd 13512 (1995).

could potentially discriminate against a carrier whose customers average significantly less usage and per-line revenue than other carriers. Such an approach would also discourage carriers from seeking out and serving low-volume users.[50] Likewise, a per-minute approach would be difficult to administer because many services are not measured on a minutes-of-use basis (e.g., special access facilities).[51] By contrast, the revenues attributable to telecommunications services appear to be a more accurate indication of a carrier's market share, are widely reported, and are more easily verifiable than customer lines or minutes of use.[52]

Whatever mechanism the Commission ultimately adopts, the methodology should be competitively neutral. A carrier's universal service obligations should not be a factor in the carrier's success or failure in the interexchange marketplace. Equally important, telecommunications carriers should be required to include a separate universal service charge on their invoices to consumers. In other words, telecommunications carriers should not be permitted to "bury" these charges in their rates. Such a requirement will serve two worthwhile purposes. First, it will prevent carriers from discriminating against particular classes of customers by requiring them to bear a disproportionate share of their universal service support payments. Second, it will create healthy marketplace pressure to reduce the size of the universal service support pool.

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[50] Id. at 13556.

[51] Id. at 13557.

[52] Id. at 13558.

V. THE COMMISSION SHOULD NOT REQUIRE PURELY PRIVATE NETWORKS OR OTHER PROVIDERS OF INTERSTATE TELECOMMUNICATIONS TO MAKE ADDITIONAL UNIVERSAL SERVICE SUPPORT CONTRIBUTIONS PURSUANT TO SECTION 254

In addition to requiring every telecommunications carrier that provides interstate telecommunications to contribute to universal service, Section 254(d) empowers the Commission to require "[a]ny other provider of interstate telecommunications . . . to contribute to the preservation and advancement of universal service if the public interest so requires."[53] Accordingly, the Commission's Notice seeks comment on whether universal support obligations should be limited to "telecommunications carriers"[54] or whether they should be extended more broadly to "other provider[s] of interstate telecommunications."[55] The Commission also asks whether very small telecommunications carriers should be exempted from the obligation to contribute to universal service.[56]

ITAA and EMA submit that universal service is an inherently public concept. Accordingly, universal service support obligations should be limited to telecommunications carriers that, by definition, generate their profits from serving the public. Indeed, telecommunications carriers directly benefit from universal service because increased telephone subscribership increases the number of customers that are likely to use the carriers' services.

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[53] 47 U.S.C. § 254(d).

[54] The 1996 Act defines "telecommunications carrier" to include all common carriers, except aggregators (i.e., payphone operators). 47 U.S.C. § 153(49). Other providers of telecommunications would therefore presumably include private carriers and payphone operators.

[55] Notice at ¶ 119.

[56] Id. at ¶ 120.

The Commission certainly should not require universal service contributions of private networks that are operated by companies solely for their own internal business purposes. Plainly, such networks are not "provider[s] of telecommunications" within the meaning of Section 254(d). Private internal networks do not provide service to third parties; they exist solely to meet the internal communications needs of the operator. As a consequence, they are not in the business of providing telecommunications. Congress never evidenced any intent to bring such private networks within the scope of Section 254, and the Commission should not lightly do so. Moreover, given that there are literally thousands of purely private networks, the task of identifying and assessing universal service contributions would be overwhelming and would certainly outweigh the modest benefits likely to be derived.[57] Further, there is no reason to subject private networks to a separate universal service support obligation. Private network operators, like other users, will contribute to universal service through the payments they make to the telecommunications carriers from which they obtain service.

The Commission should also not require separate universal service support payments from "other provider[s] of telecommunications." Unlike telecommunications (i.e., common) carriers, private carriers generally derive little or no direct benefit from universal service. By definition, private carriers serve a limited number of customers and make individualized decisions whether and on what terms to serve. Moreover, many of these private operators are relatively small in size. Indeed, in some cases, they may be companies that sell excess capacity on their otherwise internal networks to one or two customers that happen to be

[57] It would also be difficult to derive a mechanism to assess universal service contributions from private network operators, since these networks do not generate any revenues and, because they are internal, few are designed to measure minutes of use.

geographically proximate to their own operations. The annual revenues generated by the sale of such excess capacity is often minimal. Furthermore, to the extent that private carriers resell services provided by telecommunications carriers, they will contribute to universal service through their payments to an underlying carrier.

If the Commission is inclined to exercise its authority to subject other providers of telecommunications to a universal service support obligation, it should limit this requirement to those providers of telecommunications that own their own transmission facilities. Private operators that merely resell the services of facilities-based carriers will have already paid their pro rata share for the preservation and advancement of universal service. Plainly, it would be unfair to require these providers to contribute twice to the support of universal service: once in the payments they make to carriers for their underlying service and once directly to the universal service fund administrator. Entitling non-facilities-based providers to a credit -- i.e., requiring them to pay their underlying carrier and then seek a credit from the universal service fund administrator -- would create a needless bureaucracy and impose needless costs on these operators.[58] The Commission should also not burden "other provider[s] of telecommunications" whose contribution to universal service would be de minimis.[59]

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[58] Even worse would be a scenario in which non-facilities-based operators were required to pay both the underlying carrier and the administrator and then seek a refund from one or the other.

[59] The Commission is empowered to exempt telecommunications carriers or classes of carriers from universal service support obligations if the level of their contribution would be de minimis. See 47 U.S.C. § 254(d).

VI. THE COMMISSION SHOULD APPOINT A SINGLE, NON-GOVERNMENTAL ENTITY TO ADMINISTER THE COLLECTION AND DISTRIBUTION OF UNIVERSAL SERVICE SUPPORT FUNDS

In the Notice, the Commission seeks comment on the best administrative structure for collecting universal service support payments and distributing them to eligible telecommunications carriers. One option proposed by the Notice is to establish a single, non-governmental administrator for the universal service fund. Another is to rely on individual state public utility commissions or groups of state commissions to perform this task.[60]

ITAA and EMA submit that the Commission should designate a single, non-governmental administrator to collect and distribute universal support payments. A single, independent entity: (1) will ensure that the Commission's policy determinations are effectively carried out; (2) will be more likely to treat all carriers in a uniform, nondiscriminatory manner; (4) will not be distracted by other obligations; and (3) will be better able to resolve disputes and address other time-sensitive issues promptly.

By contrast, relying on fifty different state commissions or groups of commissions -- each of which has independent legal status and authority -- may make it difficult to ensure that the Commission's policies are uniformly and faithfully executed. Further, relying on the states carries with it the danger that telecommunications carriers will receive inconsistent treatment, depending upon the jurisdiction in which they provide service. Moreover, "governing by committee" -- almost by definition -- will result in slower, more contentious deliberations. In addition, some states may simply not have the necessary resources to devote to universal service issues. Whatever the cause, the states are unlikely, either individually or collectively, to be in

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[60] Notice at ¶¶ 128, 130.